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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-37.

SUSAN LYNN VORCHHEIMER by Her Parents BERT and CAROL VORCHHEIMER Guardians Ad Litem on Her Own Behalf and on Behalf of All Others Similarly Situated,

Petitioners,

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO Superintendent of the School District of Philadelphia,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENTS.

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SUSAN LYNN VORCHHEIMER, by her parents BERT and CAROL VORCHHEIMER, guardians ad litem, on her own behalf and on behalf of all others similarly situated, *Petitioners,*

v.

SCHOOL DISTRICT OF PHILADELPHIA and MATTHEW W. COSTANZO, Superintendent of the School District of Philadelphia, *Respondents.*

—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—

BRIEF FOR RESPONDENTS.

—

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 532 F. 2d 880. That Court's order denying rehearing *en banc* is not yet reported: it is set out in the Appendix to the Petition for a Writ of Certiorari at 36a. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 400 F. Supp. 326. Copies of all opinions and orders below are set out in the Appendix to the Petition for A Writ of Certiorari (Pet. at 1a-86a).[1]

1. References to the Petition for A Writ of Certiorari and attached Appendix are designated herein by the abbreviation "Pet." and "Pet. a" respectively; the Brief for Petitioners and the separate Appendix are designated "Br." and "Br. a" respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 16, 1976, a petition for rehearing *en banc* was denied April 12, 1976. The petition for a writ of certiorari was filed July 12, 1976; certiorari was granted October 18, 1976. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether it is consistent with the Constitution and laws of the United States for a public school district to maintain, in a system otherwise coeducational, a limited number of single-sex schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED.

Constitutional Provision:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

Public Law 92-318, Title IX, § 901, as amended, 20 U. S. C. § 1681, et seq., provides in pertinent part:

> § 1681 (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> > (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> ° ° °

Public Law 93-380, Title II, 20 U. S. C. § 1701, et seq., provides in pertinent part:

> § 1701 (a) The Congress declares it to be the policy of the United States that—
>
> > (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

• • •

§ 1702 (a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

• • •

§ 1703 No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

• • •

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

• • •

§ 1705 Subject to the other provisions of this subchapter, the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex, or national origin. . . .

§ 1706 An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. . . .

§ 1712 In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

§ 1720 For the purposes of this subchapter—

• • •

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin, or within a school on the basis of race, color, or national origin.

• • •

Public Law 93-380, Title VIII, § 844, 88 Stat. 612, provides:

> Sec. 844. The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Regulation:

Federal Regulation, 45 C. F. R. § 86.35 provides:

> A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:
>
> (a) Any institution of vocational education operated by such recipient; or
>
> (b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

STATEMENT.

This action was brought on behalf of Petitioner Susan Lynn Vorchheimer, then a student in the ninth grade, by her parents, as guardians ad litem, seeking to enjoin Respondent School District of Philadelphia (School District) from denying Petitioner admission to Central High School solely on the b. 's of her sex.

The School District is an agency of the Commonwealth of Pennsylvania responsible for providing public education in the City and County of Philadelphia. (Pet. 38a.) In so doing, it has established senior high schools. Relevant to this case are the comprehensive and academic senior high schools.

Comprehensive senior high schools "provide a wide range of courses, including those required for college admission, and offer placement classes for students who are intellectually able to progress at a faster than average rate." (Pet. 2a-3a.) Graduates of these schools "have been and are accepted for matriculation by the best and and most prestigious colleges and universities." (Pet. 44a-45a.)[2] Enrollment in the comprehensive senior high schools is usually based on the residence of the student within a designated area. While most of these schools are coeducational, two admit only males and one admits only females. (Pet. 3a.)

The School District of Philadelphia also maintains for the college-bound student two academic high schools which have only college preparatory courses. These schools accept students from the entire City and have high admission standards. Philadelphia High School for Girls

2. Although expressing some dissatisfaction with the education available at her comprehensive high school (Br. 26a-28a), Petitioner was able to qualify for early admission to college after the eleventh grade at that school. (Pet. 5a n. 3.) She is now a first year student at the University of Pennsylvania. (Br. 7 n. 1.)

(Girls High School) admits only females, while Central High School admits only males. Girls High School and Central High School are "academically and functionally equivalent" (Pet. 5a) and are equal in preparing students for college. (Pet. 43a.)

In December 1973 and January 1974, while a junior high school student, Petitioner visited a number of senior high schools in the School District, including George Washington High School, a comprehensive high school in her neighborhood. She also visited Girls High School and Central High School. At Girls High School she "sat in on one of the classes and walked around," (Pet. 41a), thereby formulating an unfavorable "impression" of the school and the thought that she would be "harmed" by attending there. (Pet. 41a.)

Petitioner decided that she wished to attend Central High School. In January 1974 her father submitted, on her behalf, an application for admission to Central High School, which was rejected by the School District solely on the basis of Petitioner's sex. (Pet. 41a-42a.) Petitioner alleges no psychological injury to her from the policy of the School District at issue here. She has recognized that Girls High School has a "reputation of excellence" similar to Central High School (Br. 22a), and admits that Girls High School is an "outstanding school." (Br. 17.)

A class action suit was started in March 1974 in the United States District Court for the Eastern District of Pennsylvania seeking relief under 42 U. S. C. § 1983 from alleged unconstitutional discrimination. After pretrial discovery, including the taking of the deposition of the Superintendent of Schools, a three-day nonjury trial was held in May 1975.

At the trial it was stipulated that single-sex education has a long history and world-wide acceptance and that

there are educators who regard single-sex education as a natural and reasonable educational approach. (Pet. 46a.) In addition, the School District presented expert testimony and exhibits on the educational value of single-sex education. (Pet. 46a-52a.)

The District Court expressed "little doubt" that pursuant to the rational relationship standard set forth by this Court which gives due deference to reasonable legislative classifications, the School District's policy would be constitutional. (Pet. 61a-62a.) As the Court stated:

> "Most likely plaintiff's stipulation that 'the practice of educating the sexes separately is a technique that has a long history and world-wide acceptance' or that 'there are educators who regard education in a single-sex school as a natural and reasonable educational approach' would have proven fatal to her case, Even if this were not so, this Court would probably have felt compelled to validate the sex-segregated school on the basis of Dr. Jones' hypotheses concerning the competition for adolescent energies in a coed school and its detrimental effect on student learning and academic achievement." (Pet. 62a.)

However, the District Court held that the School District failed to show that the policy in question bears a "fair and substantial relationship" to any of their legitimate objectives. (Pet. 55a-56a.) The Court entered an Order enjoining the School District from refusing to admit Petitioner or any other member of the class she represents to Central High School solely on the basis of sex. (Pet. 86a.)

The School District's application for a stay of Order was denied by the District Court. On appeal, a stay was granted by the Court of Appeals for the Third Circuit,

pending expedited appeal. Petitioners' application to vacate the stay was assigned to the panel designated to hear the case on the merits. The panel vacated the stay with regard to the Petitioner, who was then an eleventh grade student, but not as to the class she represents. Petitioner, however, declined to attend Central High School. She continued at the comprehensive senior high school where she participated in the program for early admission to college (Pet. 5a n. 3), from which she was accepted into the University of Pennsylvania after completion of the eleventh grade. (Br. 7 n. 1.)

The Court of Appeals for the Third Circuit in a two-to-one decision reversed the judgment of the District Court and held that the "regulations establishing admission requirements to Central and Girls High Schools based on gender classification do not offend the Equal Protection Clause of the United States Constitution." (Pet. 16a.) The Court reviewed recent decisions of the Supreme Court and found that in the only cases where statutes were held unconstitutional the rights of the sexes conflicted and those of the female were found to be inadequate. In this case, by contrast, the Court found no allegation of a deprivation of an education equal to that offered to males. (Pet. 12a.) Moreover, the Court determined that "[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure," (Pet. 13a) and that the policy at issue has "its basis in a theory of equal benefit and not discriminatory denial." (Pet. 14a.)

The Court recognized that the Supreme Court's affirmance of *Williams v. McNair*, 316 F. Supp. 134 (D. S. C. 1970), aff'd 401 U. S. 951 (1971) had precendential weight. The Court concluded that the *Williams* case is distinguishable from *Reed v. Reed*, 404 U. S. 71 (1971) in that the restrictive admissions policy in *Williams* applied to both sexes, equally, in contrast to *Reed*, where men received favored treatment.

The Court of Appeals held that:

> "The record does contain sufficient evidence to establish that a legitimate educational policy may be served by utilizing single-sex high schools. The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance. Thus, given the objective of a quality education and a controverted, but respected theory that adolescents may study more effectively in single-sex schools, the policy of the school board here does bear a substantial relationship." (Pet. 15a-16a.)

The Court of Appeals did not decide whether the case at bar required application of the rational or substantial relationship tests because, using either, the School District's policy is constitutional. (Pet. 16a.)

The dissenting judge recognized that:

> "Admittedly coeducation at the senior high school level has its supporters and its critics. The majority is also undoubtedly correct in suggesting that a legitimate educational policy may be served by utilizing single-sex high schools." (Pet. 32a.)

In his view, however, the "substantial relation" test applied and was not met by the School District.

Although no allegation of any statutory violation was made in the Complaint, discussed by the District Court, or briefed by the parties, the Court of Appeals requested that

the parties address themselves to certain statutory issues at the oral argument.

The Court found that Public Law 92-318, Title IX, § 901 (1972), requiring that Federally funded programs not discriminate on the basis of sex, excluded the admission policies of secondary schools. 20 U. S. C. § 1681 (Pet. 6a.) The Court concluded that the Equal Educational Opportunities Act of 1974 (P. L. 93-380, Title II), did not prohibit the states from segregating schools on the basis of sex, although there is a specific proscription of segregation based on race, color, or national origin. 20 U. S. C. 1703(a) (Pet. 9a). The Court held, over the disagreement of the dissenting judge, that the wording of the 1974 statute is ambiguous and that research into the legislative history revealed "no indication of Congressional intent to order that every school in the land be coeducational and that educators be denied alternatives." (Pet. 11a.)

The Petition for Rehearing was denied by the Court of Appeals on April 12, 1976. (Pet. 36a-37a.)

A Petition for a Writ of Certiorari was filed in July, 1976 to which the School District responded in August, 1976. This Court granted the Petition on October 18, 1976.

SUMMARY OF ARGUMENT.

I

This is not a sex discrimination case. Although the policy of the School District is to maintain two exclusively academic senior high schools which are separated on the basis of sex, and admission to which is by application and not by assignment, the schools, Girls High School and Central High School, offer comparable education (Fact Finding 30; Pet. 45a), and are equal in preparing students for college. (Fact Finding 18; Pet. 43a.) The two schools provide alternatives for college preparatory students, who also have the further option of obtaining a coeducational academic education at the comprehensive senior high schools of the School District. (Pet. 2a-3a.)

II

Girls High School has course offerings of similar and equal quality as Central High School (Fact Finding 27; Pet. 45a), including extensive offerings in the fields of science and mathematics. (D-2.) Girls High School has had its graduates accepted by the best and most prestigious colleges and universities (Fact Finding 25; Pet. 44a-45a) and includes among its alumnae leaders in the community. (Fact Finding 23; Pet. 44a.) A female attending Girls High School is denied no right accorded to males at Central High School. The situation, therefore, lacks the discrimination present in *Reed v. Reed, supra,* since neither sex is extended a benefit by the state to the disadvantage or detriment of the other sex. Furthermore, the notion that there is a constitutional right to a coeducational, exclusively academic education is entirely devoid of legal basis.

III

The Court has affirmed the right of the state to maintain single-sex educational institutions, where, as here, no

discrimination results because students denied access to a particular school are able to obtain an equal education elsewhere within the system. *Williams v. McNair, supra.*

Since the Court has neither held sex to be a suspect classification nor education to be a fundamental right requiring strict scrutiny, the appropriate standard of review is the rational relationship test. That standard requires that the state's system bear some rational relationship to legitimate purposes. *San Antonio Independent School District v. Rodriguez,* 411 U. S. 1 (1973). Here, the Court of Appeals, the dissenting judge, and the District Court all recognized that maintaining Central High School and Girls High School as single-sex educational alternatives bore a rational relationship to a legitimate educational purpose.

IV

The School District has, in fact, proven the reasonableness of offering single-sex schools as an educational alternative. Petitioners stipulated that there are educators who regard education in single-sex schools as a reasonable educational approach. (Fact Finding 33; Pet. 46a.) Moreover, the School District introduced testimony and studies on the educational value of single-sex education, which the District Court found demonstrated that students in single-sex schools have a higher regard for scholastic achievement than their coeducational counterparts. (Fact Finding 46; Pet. 52a.)

The ability of the School District to maintain some single-sex schools directly advances the legitimate goal of providing educational alternatives from which students and their parents may choose. Under the system challenged herein, a student who qualifies may obtain an academic education in either a single-sex or a coeducational high school. Thus, as the Court of Appeals recognized, if single-sex schools are forbidden as an educational alternative the students of the Philadelphia public school system and their parents "would be denied their freedom of choice."

V

The School District's policy is essential to the legitimate goal of allowing flexibility, diversity, and innovation in education. Petitioners admit, and all judges below have recognized, that the methodology at issue is a "natural and reasonable educational approach" with a "long history and world-wide acceptance." As the Court of Appeals held, professional educators must be free to choose among such reasonable and respected alternatives if the "primary aim" of quality education is to be attainable.

VI

The policy of the School District is consistent with Title IX 20 U. S. C. § 1681(a)(1). While Title IX prohibits separation by sex in certain specified educational areas, that prohibition does not extend to secondary schools.

Nothing in the Equal Educational Opportunities Act of 1974 (Public Law 93-380, Title II) prohibits the School District's policy. The School District's conduct in providing equal educational opportunities for males and females is consistent with Congressional policy, as shown by the Congressional mandate to the Department of Health, Education, and Welfare to promulgate regulations implementing Title IX.[3]

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3. Respondents argument that this matter is moot (Brief For Respondents in Opposition to the Petition for Writ of Certiorari at 15-17) is incorporated herein by reference.

ARGUMENT.

I. The School District's Policy of Providing an Opportunity for College Preparatory Students to Attend an Exclusively Academic High School Limited to Members of Their Own Sex Is Not Discriminatory and Is Consistent With the Constitution of the United States.

A. In Offering Females The Opportunity to Attend Girls High School, an Educational Institution Which Is the Equal of Central High School in Preparing Students for College, the School District Does Not Deny Equal Protection of the Laws to Females.

It is clear from the record that quality education is offered on equal terms to the female and the male students of the School District. Any attempt to demonstrate significant differences between the education offered to females and males fails because the two schools in question are in fact equal. (Fact Findings 18; Pet. 43a.)

The District Court found that the education available at Girls High School and Central High School is comparable (Fact Finding 30; Pet. 45a), and that the schools are equal in preparing students for college. (Fact Finding 18; Pet. 43a.) In addition, the schools have comparable admissions standards (Fact Finding 24; Pet. 44a), graduates accepted by the best and most prestigious colleges and universities (Fact Finding 25; Pet. 44a-45a), similar courses of instruction of equal quality (Fact Finding 27; Pet. 45a) and, with the exception of scientific facilities, in which Central was found to be superior, comparable academic facilities. (Fact Finding 26; Pet. 45a.)

Petitioners seek to escalate the finding concerning "scientific facilities" to the position of the "best science education." (Br. 19.) The record does not bear out this

assertion. To the contrary, the District Court found that the courses of instruction at Central High School and Girls High School are "similar and of equal quality." (Fact Finding 27; Pet. 45a.) For example, the record in this case is replete with evidence of the science opportunities available for females at Girls High School. *Facts and Figures 1975*, a publication of the School District in the record (D-2, R. 224, 228), shows the extent of the science and mathematics programs offered at Girls High School. (D-2 at 82.) Among the extensive areas of instruction offered in science at Girls High School are: Advanced Placement Biology, Advanced Placement Chemistry, Carbon Chemistry, Meteorology, Ecology, Genetics, Harvard Project Physics, Science Seminar, and Science Lab Techniques. (D-2 at 82). Advanced Placement Mathematics, Calculus, Independent Study in Algebra and Calculus, and Introduction to Computers are some of the offerings in the extensive mathematics program. (D-2 at 82.) Thus, the science and mathematics offerings are at least equal to those at Central High School. (D-2 at 76.) Moreover, a course by course comparison leads to the conclusion that the course offerings at Girls High may well be superior.[4]

The only evidence in the record for the District Court's finding of "superior scientific facilities" is the testimony of a Central High School student that the school has a classroom planetarium and student-built cyclotron. (Br. 40a.) With that paucity of evidence in the record, and especially in light of the outstanding science program at Girls High School, the Court of Appeals and the Dis-

4. Whereas Girls High School offers sixteen courses in science, Central High School's science offerings total only eight. (Compare D-2 at 82 and 76.) Further, Girls High School offers a program permitting seniors to work on projects of their own design at local institutions, such as hospital laboratories and a college of pharmacy. (Testimony of Dr. R. M. Klein, Principal of Girls High School, R. 230.)

trict Court correctly attributed no significance to those facilities and refused to translate them into "superiority of Central High in the field of science", as petitioners would do. (Br. 18 n. 13.) The dissenting judge, as well, put no weight on the scientific facilities, never mentioning them in his lengthy dissent. (Pet. 17a-33a.) The indisputable fact is that Petitioners have not proven that Central High School offers a scientific education superior to that of Girls High School; rather, the record strongly suggests the contrary.

In their effort to magnify insubstantial differences between Central High School and Girls High School, Petitioners have advanced an argument alleging inequality due to intangible "factors" or "prestige" allegedly associated with Central High School. Neither the Court of Appeals, the dissenting judge nor the District Court was convinced by this unsupported argument. The District Court stated:

> "We reject plaintiff's argument that, given Central's long history, prestige, and long list of notable graduates, the exclusion of women from Central creates a sense of inferiority in Philadelphia's female students which rises to the level of a Constitutional deprivation." (Pet. 58a n. 1.)

Although Central High School has a private endowment, the Court found "no evidence that as a result of this endowment Central's facilities, faculty, or courses of instruction is superior to Girls." (Fact Finding 28; Pet. 45a.)

As Petitioners admit, Girls High School is indisputably an "outstanding school." (Br. 17.) Indeed, the District Court found that Girls High School has a large number of graduates who are influential in business, professional or academic affairs, and whose numbers include community leaders among whom are three local judges and a vice

president of the American Medical Association. (Fact Finding 23; Pet. 44a.) Testimony revealed that the Girls High School Alumnae Association has contributed substantial sums of money creating college scholarships for Girls High School students. (Testimony of Dr. R. M. Klein, Principal of Girls High School, R. 232.)

Even if Girls High School's list of "influential graduates" may not be as extensive as Central High School's, that is not a reflection on Girls High School but rather on the unfortunate history of sexism in this society. Importantly, in producing community leaders, including members of the judiciary, an officer of the American Medical Association and influential persons in business, professional and academic affairs (Fact Finding 23; Pet. 44a), Girls High School has contributed significantly to eliminating outmoded sexual stereotypes. The Court may take judicial notice that every student leader, every newspaper editor, every member of student council, etc., at Girls High School is a female, thereby helping immeasurably to erase the old notions that some roles are not appropriate for women. Petitioners have described the history of Girls High School as "inspiring to a student of the women's movement" (Petitioners'—therein Plaintiffs—Brief to the District Court at 12), and that is a fair assessment of the contribution of the school. Thus it is ironic that Petitioners now seek to undermine this continuing inspiration to female educational accomplishment.

Petitioners place mistaken reliance on *Sweatt v. Painter*, 339 U. S. 629 (1950), a case involving the refusal to admit a student to the preeminent law school in Texas because of his race. That case can be distinguished from the one at bar on several grounds. As *Sweatt* involved race it is inapplicable to a case concerning classification on the basis of sex, for as the Court of Appeals stated in distinguishing *Sweatt* and *Brown v. Board of*

Education, 347 U. S. 483 (1954): "Race is a suspect classification under the Constitution, but the Supreme Court has declined to so characterize gender." (Pet. 13a.) As numerous decisions of this Court have held, forced racial segregation necessarily engenders a sense of inferiority. In contrast, as the District Court found (Pet. 58a), maintaining a limited number of voluntary, single-sex schools as an educational alternative has no such effect when comparable educations are offered at the all-male and all-female schools.

Moreover, the disparity in treatment accorded *Sweatt* as to law schools is distinguishable from Petitioners' position herein for additional reasons. The law school in *Sweatt*, to which blacks were relegated, was not yet accredited, and was in many objective factors clearly inferior: number of faculty, variety of courses and opportunity for specialization, size of student body and availability of the law review and similar activities. 339 U. S. at 633-4. The Court there found no "substantial equality" in the educational opportunities offered the two races. 339 U. S. at 633. In this case, by contrast, Girls High School has been found equal to Central High School in preparing its students for college, (Fact Finding 18; Pet. 43a), and "academically and functionally equivalent" to Central High School. (Pet. 5a.)

There is nothing in the record here to suggest that intangibles are as vitally important in a high school as the Court in *Sweatt* found to be the case in law schools. Nor is there any basis to conclude that Girls High School's very substantial quantum of intangibles leaves its students deprived in any way whatsoever. Moreover, Petitioner's testimony indicates that she was motivated to apply to Central High School *not* by its intangibles but by its reputation for "academic excellence" (Br. 25a), although even she admitted that Girls High School has a similar "reputation of excellence." (Br. 22a.) The District Court found *as a fact*, that Girls High School is the academic equal of Central High School (Fact Finding 18; Pet. 43a and Fact Finding 30; Pet. 45a), and that no relevant difference in intangibles exists between the two schools. (Pet. 58a n. 1.) Furthermore, the District Court found that graduates of Girls High School "have been and are accepted for matriculation by the best and most prestigious colleges and universities." (Fact Finding 25; Pet. 44a-45a.) Thus, this case is readily and strikingly distinguishable from *Sweatt* and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U. S. 637 (1950).

B. The School District's Policy of Treating the Sexes Similarly by Providing to Both Sexes the Opportunity for Equal Education at Single-sex Academic Senior High Schools Does Not Violate the Fourteenth Amendment Since There Is No Unequal Treatment of Either Sex.

The School District's policy at issue has the same effect on both sexes. As the Court of Appeals below stated: "[i]f there are benefits or detriments inherent in the system, they fall on both sexes in equal measure." (Pet. 13a.)

Thus, a male could have made the assertion that Petitioners did in the Complaint by alleging that the School District discriminates against:

> "[q]ualified students who attend or in the future may choose to attend the academic high schools since it denies them the benefit of co-educational learning experience available to other students in the school system. . . ." (Br. 11a para. 23.)

This Court has never found there to be a "right" to a coeducational, exclusively academic education. More-

over, in light of the Court's decision in *San Antonio Independent School District v. Rodriguez, supra,* holding that education is not a fundamental right under the Constitution, no allegation of a Constitutional right to a coeducational exclusively academic school can be seriously asserted. Where, as here, the benefits and burdens of governmental policy are distributed equally to all the people there is no meritorious claim by any individual of deprivation of equal protection of the laws. *Palmer v. Thompson,* 403 U. S. 217 (1971).

The cases cited by Petitioners, *Reed v. Reed, supra, Frontiero v. Richardson,* 411 U. S. 677 (1973), *Weinberger v. Wiesenfeld,* 420 U. S. 636 (1975), and *Stanton v. Stanton,* 421 U. S. 7 (1975), do not support the result for which they contend. Each of these cases, unlike the case at bar, involved harmful discrimination against women resulting from governmental action grossly over—or underclassifying on the basis of sex.[5] The would-be administratrix in *Reed,* the female service-woman with the dependent husband in *Frontiero,* the deceased woman whose spouse received no payments in *Wiesenfeld,* and the female who stopped receiving support payments in *Stanton* are all similar in that they were denied a benefit accorded to their male counterparts for reasons unrelated to their needs or abilities.

By contrast the females in this case are denied no benefit accorded to males. Both females and males are afforded an equal academic education by the School District and neither males nor females are able to go to a coeducational high school offering solely an academic curriculum. Moreover, the criteria for admission to Girls High School and Central High School are identical. Cf. *Bray v. Lee,* 337 F. Supp. 934 (D. Mass. 1972). The

5. *See* Johnson, *Sex Discrimination and the Supreme Court—1975,* 23 UCLA L. Rev. 235, 261 (1975).

maintenance of Central High School and Girls High School as single-sex schools is based upon respected educational principles which the Philadelphia School Board, the local body charged with responsibility for public education, has found to pertain to adolescent students of both sexes. (Opinion of the District Court, Pet. 80a.) [6]

C. The Maintenance of Public Educational Institutions Admitting Only Members of One Sex Has Been Upheld by This Court in a Case Not Distinguishable From the Case at Bar.

This Court has affirmed the right of a State to use gender classifications in its school admission policy where equivalent educational opportunities are available to both sexes. *Williams v. McNair,* 316 F. Supp. 134 (D.S.C. 1970), aff'd 401 U. S. 951 (1971). There were no dissents on the merits of the affirmance by the Court. (Mr. Justice Harlan would have remanded on procedural grounds.) *Williams v. McNair* and this case are indistinguishable in pertinent aspects. Though males were denied admission into all-female Winthrop College in *Williams,* they had available educationally equivalent alternatives in the form of other state-supported colleges. 316 F. Supp. at 138. Here Petitioners may choose to attend Girls High School, which is the equal of Central High School in preparing students for college (Pet. 43a), or they may decide to go to a coeducational comprehensive high school offering among its courses a complete academic curriculum including advanced placement classes for students who are intellectually able to progress at a faster than

6. While the School District made no argument based on archaic, or "sexist" concepts about women, Petitioners' expert did in supporting his preference for coeducation. He testified:

"I think it is just nice to have young ladies about the campus myself." (R. 30.)

average rate. (Pet. 2a-3a.) Accepting either alternative, Petitioners do not suffer discriminatory treatment. She is in the same position as the males in *Williams* who are denied the opportunity to attend a specific school but not deprived of an opportunity to obtain an equal education. (Pet. 5a.) The neutral aspect of the School District's policy is evident from the fact that boys cannot gain admission to educationally equal, all-female Girls High School.[7]

In *Williams v. McNair* the Court held that a legislative classification creating single-sex schools was premised on respectable pedagogical opinion and did not violate the Equal Protection Clause of the Fourteenth Amendment. 316 F. Supp. at 138. This Court's affirmance of *Williams v. McNair* is a decision on the merits of the case. *Hicks v. Miranda*, 422 U. S. 332 (1975). *Williams* is thus directly on point and this Court should grant similar deference to the reasonable pedagogical policy behind the continued maintenance of equal single-sex academic high schools in Philadelphia.

7. *Williams* distinguished *Kirstein v. Rector and Visitors of the University of Virginia*, 309 F. Supp. 184 (E. D. Va. 1970). In *Kirstein* a three-judge District Court held that denial of admission to females to the University of Virginia at Charlottesville, the largest and most diverse educational institution in the State, denied women educational opportunities not afforded elsewhere. The *Kirstein* Court stated: "Unquestionably the facilities at Charlottesville do offer courses of instruction that are not available elsewhere." 309 F. Supp. at 187. *Kirstein* was distinguished in *Williams* on that basis. 316 F. Supp. at 138. Similarly, both the District Court and the Court of Appeals in the case at bar found *Kirstein* easily distinguishable because of the equality of Central and Girls. The District Court noted the academic inferiority of the state supported colleges available to women in *Kirstein*, as distinguished from the equal educational opportunities here available. (Pet. 78 n. 5.) The Court of Appeals in the instant case stated, as to Girls and Central, "[t]he factual findings establish that, for many years past and at the present, excellent educational facilities have been and are available to both sexes." (Pet. 15a and 15a n. 9.) *Kirstein's* facts thus clearly distinguish it from this case.

II. Under Either the Rational Relationship Standard or the Fair and Substantial Test the School District's Policy of Providing an Opportunity for College Preparatory Students to Attend an Academic School for Their Own Sex Is Constitutional.

A. No Standard of Strict Judicial Scrutiny Is Applicable in This Matter as No Suspect Class or Fundamental Right Is Involved.

The proposition that legislative classification by sex is inherently suspect, warranting strict judicial scrutiny and compelling state justification, has never commanded the assent of a majority of this Court. See *Stanton v. Stanton, supra* at 13; *Weinberger v. Wiesenfeld, supra; Schlesinger v. Ballard*, 419 U. S. 498 (1975); *Kahn v. Shevin*, 416 U. S. 351 (1974); *Frontiero v. Richardson, supra; Reed v. Reed, supra.* Indeed, as recently as *Craig v. Boren*, 45 U. S. L. W. 4057 (December 20, 1976), this Court did not apply strict scrutiny in a case involving disparate treatment of men and women. Nothing in the history or rationale of the Fourteenth Amendment's Equal Protection Clause compels the invalidation of all gender-based classifications. Indeed, as the Court recently observed, "gender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin, supra* at 355, n. 10. Petitioners do not ask the Court to reassess that position.

The strict standard of review is not applicable in a matter involving education. The Court has held that education is not within the limited category of rights recognized to be fundamental under the United States Constitution. *San Antonio Independent School District v. Rodriguez, supra.*

B. The Appropriate Standard of Review in This Matter Is the Rational Relationship Test.

The standard of review applicable here is whether the School District's policy bears some rational relationship to a legitimate state purpose. In *Williams v. McNair, supra,* a case clearly in point, this Court upheld a legislative classification establishing colleges separated on the basis of sex. The District Court had tested the statute against the rational relationship standard and held that the classification, being premised on respected pedagogical opinion, did not deny equal protection. 316 F. Supp. at 138.

A standard more rigorous than the rational relationship test has never been applied where the sexes are accorded *equal* treatment as in the case at bar. This is what differentiates this case from *Reed v. Reed, Frontiero v. Richardson, Weinberger v. Wiesenfeld, Stanton v. Stanton,* and *Craig v. Boren.* In each of those cases, the sexes were afforded disparate treatment; here men and women are provided with equal educational opportunity. *Reed, Frontiero, Wiesenfeld* and *Stanton* each involved a statutory scheme which the Court found to deny equal protection either because based on mere administrative ease and convenience or because based upon "old notions" of sex stereotypes.[8]

The instant case involves separation of the sexes as an alternative for respected pedagogical purposes, but the crucial fact is that males and females are treated equally. The last case in which a similar set of conditions was before this Court was *Williams v. McNair, supra,* in which

8. Compare *General Electric Co. v. Gilbert,* 45 U. S. L. W. 4031 (December 7, 1976), and *Geduldig v. Aiello,* 417 U. S. 484 (1974) which concerned classifications adversely affecting women alone but not gender-based. In each of these cases, the Court deemed it sufficient that a rational relationship was demonstrated, in the absence of disparate treatment based upon gender.

the Court affirmed without opinion the finding of a three-judge District Court that the statute in question did not deny equal protection where the rational relationship standard was satisfied.

More recently, in *Schlesinger v. Ballard, supra,* the Court applied the rational relationship test where there was differing treatment between the sexes, but that differing treatment was found to reflect "not archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 U. S. at 508. (Emphasis in original).

In the instant case where there is (a) no showing of disparate treatment between the sexes and (b) no showing that the classification is based upon "old notions," or archaic and overbroad generalizations, there is no reason to subject the classification at hand to the "substantial" test or any other standard more rigorous than the rational relationship test.

C. The School District's Policy Serves Legitimate Governmental Interests and Thereby Meets This Court's Standards for a Constitutional Classification.

1. Under the Traditional Standard of Review the State Needs to Show That Its Policy Bears Some Rational Relationship to Legitimate State Purposes.

On many occasions this Court has articulated the proper standard of review under the rational relationship test:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard

> of review, which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District v. Rodriguez, supra* at 40.

Indeed, this Court has emphasized the necessity of granting due deference to the state under the rational relationship test by holding that the constitutionality of governmental action is presumed "even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their [the legislature's] statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald v. Board of Election Commissioners,* 394 U. S. 802, 809 (1969). *McGowan v. Maryland,* 366 U. S. 420 (1961).

2. All of the Judges Who Have Reviewed This Matter Have Recognized the Legitimacy of the School District's Policy.

With respect to the traditional rational relationship standard, the District Court said: "There can be little doubt that under this standard the School Board's policy of maintaining Central as an all-boys' school would pass constitutional muster." (Pet. 62a.) The dissenting judge in the Court of Appeals recognized that:

> "Admittedly coeducation at the senior high school level has its supporters and its critics. The majority is also undoubtedly correct in suggesting that a legitimate educational policy may be served by utilizing single-sex high schools." (Pet. 32a.)

The Court of Appeals held that the gender-based admissions requirements to Central High School and Girls High School are constitutional under either the rational or substantial relationship tests, because measures allowing innovation in methods and techniques to achieve the "primary goal" of a quality education have a "high degree of relevance" to a legitimate educational purpose. (Pet. 15a.)

3. The Record Contains Sufficient Grounds for This Court to Determine That the School District's Policy Satisfies Both the Rational and Substantial Relationship Standards.

The record is replete with evidence to substantiate the findings of the Court of Appeals that the policy at issue in this case meets any relevant Constitutional standard. Petitioners stipulated that:

> "The practice of educating the sexes separately is a technique that has a long history and worldwide acceptance." (Fact Finding 32; Pet. 46a.)
>
> "There are educators who regard education in a single-sex school as a natural and reasonable educational approach." (Fact Finding 33; Pet. 46a.)

In addition, the evidence introduced by the School District further demonstrated the educational value of single-sex schools. (Fact Finding 34-46; Pet. 46a-52a.)

Petitioners mistakenly assert that the School District attempts to prove "the superiority of single-sex education." (Br. 40 n. 45). Moreover, Petitioners now attempt to introduce into the case material not in the record to impeach their own stipulation concerning the reasonable-

ness of single-sex schools.[9] The School District's effort, however, was aimed at showing that single-sex education, though not the only method of educating, is reasonable, worthy of retention as an alternative and, thereby, highly relevant.

It is undisputed that single-sex education counts among its adherents educators who regard the approach as "natural and reasonable." (Pet. 46a.) A study introduced by the School District by testimony of the author, Dr. J. Charles Jones (D-1, R. 159, 160) was found by the District Court to demonstrate that students of both sexes in single-sex schools have a higher regard for scholastic achievement and are more likely to spend time on homework than their coeducational counterparts. (Fact Finding 46; Pet. 52a.)

Indeed, Petitioners' expert rebuttal witness testified that he could find no fault with the methodology of the "Jones' study" and that:

> "The results suggest that some students may have more positive attitudes towards learning in single-sex schools." (R. 216.)

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9. *See e.g.* Petitioners' Brief at 36 n. 36. If, however, this Court is to consider material not in the record, the Court's attention is directed to the results of a very recent study in the education journal *Phi Delta Kappan:*

> "These findings support the idea that adolescent girls find it threatening to succeed in male-dominated areas. Success in such areas could result in negative social consequences. These perceptions of negativism increase as girls become more aware of and interested in hetrosexual relationships. Girls are apt to compete freely with boys through the elementary grades, but begin to feel increasingly inhibited during early adolescense as they seek social acceptance by boys."

Lavach and Lanier, *The Motive to Avoid Success in High-Achieving Girls, Grades 7-12,* 58 *Phi Delta Kappan* 357 at 358 (December 1976).

Thus the debate over the merits of coeducation, particularly as applied to adolescent females, continues.

One of the School District's specific goals is "providing educational options to students and their parents." (Fact Finding 49v; Pet. 53a.) Providing the alternative opportunity to attend single-sex schools advances that goal. While the proper goals of a system of public educational are an "unsettled controversy," *San Antonio Independent School District v. Rodriguez, supra* at 43, one could hardly object to the Court of Appeals assessment that:

> "The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance." (Pet. 15a.)

The ability of the School District to maintain some single-sex schools directly advances the legitimate goal of providing educational alternatives from which students and their parents may choose. Under the system challenged herein, a student who qualifies may obtain an academic education in either a single-sex or a coeducational high school. Thus, as the Court of Appeals recognized, if petitioners prevail the students of the Philadelphia public school system and their parents "would be denied their freedom of choice." (Pet. 16a.)

The School District asserted to the Court of Appeals that the District Court clearly erred in Fact Finding 51 (Pet. 54a), that "no other high school in Philadelphia offers the range of courses available at Central or Girls." Cited to the Court were evidence in the record, testimony, and the District Court's own Fact Finding 25 (Pet. 44a-45a), which showed the error of that Court in Finding 51. (Brief of Respondents—therein Appellants—to Court of

Appeals at 20-22.) The Court of Appeals appears to have reversed the District Court's finding because, in referring to the comprehensive high schools, it stated:

> "Comprehensive schools provide a wide range of courses, including those required for college admission, and offer advanced placement classes for students who are intellectually able to progress at a faster than average rate." (Pet. 2a-3a.)

Thus, the School District does provide its college-bound students with options, consistent with one of its specific goals. Existence of some imperfection in the manner in which that goal is achieved is not ground for striking down the entire system. *San Antonio Independent School District v. Rodriguez, supra* at 51.

4. A Finding for Respondents in This Case Is Critical to the Preservation of the Opportunity for Local School Boards to Continue to Employ a Respected Educational Methodology.

As the Court of Appeals recognized, if Petitioners prevail "then all public single-sex schools would have to be abolished." (Pet. 16a.) That would be damaging to students, their parents and school personnel since it would make unavailable to them a "respected educational methodology." (Pet. 16a.)

It would perhaps be most unfortunate for females, since a study has shown that there is a direct, negative relationship between the number of men students present at a college and the number of women "achievers" graduating from the institution. (Fact Finding 35; Pet. 47a.) The author of that study, Dr. M. Elizabeth Tidball of

George Washington University, testified that it would be reasonable to apply the findings of that study to the secondary school, including the academic high school level. (Fact Finding 38; Pet. 47a.)

Petitioners make much of the trend to coeducation. Since that trend is based at least in part on economic factors, (R. 29) it is dubious weight in support of the elimination of single-sex public schools as an alternative in Philadelphia and elsewhere. To the contrary, the School District's policy is essential to the legitimate goal of allowing flexibility, diversity, and innovation in education. Petitioners admit, and all judges below have recognized, that the methodology at issue is a "natural and reasonable educational approach" (Pet. 46a) with a "long history and world-wide acceptance." (Pet. 46a.) As the Court of Appeals held, professional educators must be free to choose among such reasonable and respected alternatives if the "primary aim" of quality education is to be attainable. (R. 15a.)

5. The School District's Ability to Pursue Its Policy Is Highly Relevant to the Continuation of Local Control Over Public Education Which This Court Has Recognized to Be Vitally Important.

The ability of the School District to maintain flexibility in educational methodology is consistent with this Court's holdings recognizing that school authorities are entitled to a significant degree of deference in the performance of their duties. This Court stated in *Epperson v. Arkansas*, 393 U. S. 97, 104 (1968):

> "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene

> in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

This Court has recognized and has repeatedly held that educational questions are best left to educators and local school boards. *San Antonio Independent School District v. Rodriguez, supra* at 42. In permitting the School District in this case to choose differing methodologies in providing an equal education to all students, the Court of Appeals was completely consistent with decisions of this Court recognizing the importance of local control over education. As this Court recently stated:

> "No single tradition in public education is more deeply rooted than local control . . . [it has] long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken v. Bradley,* 418 U. S. 717, 741-42 (1974).

Indeed, local control in the educational process provides the citizen with the opportunity to participate in the decision-making process, structuring school programs and encouraging "experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Independent School District v. Rodriguez, supra* at 50.

Petitioners are asking the Court to reverse its traditional view and to use the Fourteenth Amendment as a means of transferring non-discriminatory educational policy decisions from the local school boards to the Federal courts because Petitioners do not like or agree with the policy. This attempt, if successful, would freeze educational methodology into Petitioners' mold even though an alternative policy commands respect. If it is Petitioners' desire to change educational policy, their proper forum is the local school board, not the courts.

As this Court has recognized, problems surrounding education continue to consume the time and tax the wisdom of scholars in the field. What the Court said in the context of educational funding applies, as well, to the problem herein, which all admit is one of educational debate:

> "In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District v. Rodriguez, supra* at 43.

III. The School District Is in Compliance With Federal Statutory Law in Maintaining Two Equal, Exclusively Academic Schools Separated on the Basis of Sex.

The School District is not prohibited by any Federal statute from maintaining Girls High School and Central High School as single-sex institutions. At both schools students apply for *admission;* no student is assigned to either school. The decision to attend an exclusively academic school is the student's, who applies to the academic school for his or her own sex (Fact Finding 8; Pet. 40a), and meets certain academic criteria (Fact Finding 7; Pet. 40a). Moreover, the School District does not operate a *dual school system.* As the Court of Appeals found (Pet.

3a), and as Petitioners acknowledged (Br. 40 n. 45) most of the schools of the school district are coeducational.

A. The School District Is in Compliance With Title IX Which Does Not Prohibit Secondary Schools From Denying Admission of Students to Schools on the Basis of Sex.

Title IX of Public Law 92-318, as amended (Title IX) permits the School District to maintain its policy of admissions criteria based on sex, because it specifically excludes secondary schools:

> "(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;" (20 U. S. C. § 1681(a)(1).)

Since the issue before the Court concerns *admission* (not assignment) to school, and since Title IX excludes the admissions policies of secondary schools from its coverage, the Court of Appeals correctly held that the School District committed no statutory violation. (Opinion of the Court of Appeals, Pet. 6a and 11a.)

B. The Equal Educational Opportunities Act of 1974 Does Not Abrogate or Modify the Exemption Granted in Title IX Allowing Secondary Schools to Establish Admissions Criteria Based on Sex.

Petitioners assert that the Equal Educational Opportunities Act of 1974 (Public Law 93-380, Title II, § 202, et seq., 20 U. S. C. § 1701, et seq.) provides the Court with support for the judgment of the District Court. However, that law does not prohibit the conduct of the School District in establishing the *admissions* policies herein, and is consistent with Title IX's exemption of secondary school admission policies. The Equal Educational Opportunities Act states:

> "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;" (20 U. S. C. § 1703(a).)

Thus, though segregation on the basis of race, color, or national origin is prohibited, there is no proscription of segregation on the basis of sex.

Furthermore, evidence of a Congressional intent to extend Title IX's exemption of secondary school admissions policies is found within Public Law 93-380, the law containing the Equal Educational Opportunities Act of 1974. In Section 844 of Public Law 93-380 Congress directed the Secretary of Health, Education, and Welfare to prepare regulations implementing Title IX:

> "The Secretary shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the

provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Public Law 93-380 § 844, 88 Stat. 612.

The regulations authorized by the above section became effective on July 21, 1975, and provide in pertinent part:

> "A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:
>
> (a) Any institution of vocational education operated by such recipient; or
>
> (b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools." (45 C. F. R. § 86.35 (1976).)

Thus, under the regulations promulgated pursuant to Public Law 93-380 and Title IX, the continued maintenance of *equal* single-sex schools is permitted.

The fact findings concerning Girls High School and Central establish equality between the schools (Fact Findings 18, 24, 25, 26, and 30; Pet. 43a-45a) and clearly indicate that the School District is in compliance with the regulations.[10]

10. To the extent that the scientific facilities differ, the record reveals only that Central High School has a student-built cyclotron

Public Law 93-380 thus did not amend or qualify Title IX. There is no "positive repugnancy" between the statutes, and therefore Title IX's exemption of secondary schools, recognized in Public Law 93-380, has not been abrogated or qualified. *See Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974).

The unlawful practice in 20 U. S. C. § 1703(c) cited by Petitioners (Br. 41) refers to "assignments" and thus clearly does not apply here. That section states:

> "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> • • •
>
> (c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate

10. (Cont'd.)
and a classroom planetarium. (Br. 39a-40a.) If this Court should find (unlike the Court of Appeals, the dissenting judge, or the District Court) that the existence of these two apparatus is significant, the appropriate remedy would not be for the Court to require Central High School to admit females, but to order the School District to provide the items to Girls High School. 20 U. S. C. § 1712. Moreover, there is no evidence in the record that comparable or superior science facilities are not available at other schools in the School District, including the high school attended by Petitioner or the high school which is a "magnet" for science education.

> grade level and type of education for such student;" (20 U. S. C. § 1703(c).)

Here, Petitioner was not *assigned* to Girls High School. She was assigned to her neighborhood school (Fact Finding 10; Pet. 40a), a coeducational school which had the appropriate "type of education" for her, i.e. "advanced placement classes for students intellectually able to progress at a faster than average rate" (Opinion of the Court of Appeals, Pet. 2a-3a), and, significantly, Petitioner was able to qualify for early admission to college from that school. (Pet. 5a n. 3.)

Moreover, Petitioner clearly was not assigned to her neighborhood coeducational high school "for the purpose of segregating students on the basis of . . . sex . . .". 20 U. S. C. § 1705.

Thus, the School District does not commit any "unlawful practice" under the Equal Educational Opportunities Act.

Moreover, the School District is in conformity with Congressional policy in 20 U. S. C. § 1701:

> "(a) The Congress declares it to be the policy of the United States that—
>
> > (1) All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
> >
> > (2) The neighborhood is the appropriate basis for determining public school assignments."

Here, there are factual findings of the equal educational opportunities offered to the females and the males.

(Fact Finding 18; Pet. 43a, Fact Finding 30; Pet. 45a.) Also the School District assigned Petitioner to her "neighborhood" school. 20 U. S. C. § 1701(a)(2).

In 20 U. S. C. § 1702 the Congress found that "the maintenance of dual school systems in which students are assigned to school solely on the basis of . . . sex . . . denies to those students the equal protection of the laws guaranteed by the Fourteenth Amendment." 20 U. S. C. § 1702 (a)(1). While the term "dual school system" is not defined in the law, the term can not be construed to mean the operation of single-sex alternatives, such as Girls High School and Central High School within a system otherwise largely coeducational. As defined by 20 U. S. C. § 1720 "segregation" does not occur unless students are "wholly or substantially separated among the schools":

> "(c) The term 'segregation' means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin, or within a school on the basis of race, color, or national origin."

As Petitioners admit, the vast majority of schools in the system are coeducational. (Br. 40 n. 45.) [11]

Finally, even assuming *arguendo* that Congress sought to establish a constitutional standard in 20 U. S. C. § 1702(a)(1) that *assignment* to school on the basis of sex violates the Fourteenth Amendment, that "standard" cannot be interpreted to *per se* prohibit single-sex schools

11. Petitioners did not seek to amend the Complaint (Br. 5a-12a) to include relief under the Equal Educational Opportunities Act, although an Amendment was sought at the trial on other grounds. (R. 2-3, Pet. 55a, paragraph 2.) Since the Act provides that "[a]n individual denied an equal education opportunity . . . may institute a civil action in an appropriate district court . . ." (20 U. S. C. § 1706), and since such action was not instituted, the Court has no jurisdiction over Petitioners' claim now asserted.

because the operative portions of that statute plainly omit any such ban. 20 U. S. C. 1703(a). Further, the prior relevant statute, Title IX, 20 U. S. C. § 1681(a)(1), excluded a prohibition of single-sex secondary schools. In any event, by its plain language 20 U. S. C. § 1702 (a)(1) would not apply to single-sex public schools such as Central High School and Girls High School to which admission is by choice and not by assignment and which are part of a single, coeducational school system.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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